Mohd Shamshir bin Md Rashid v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-05–10 OF 2004
MOHD GHAZALI, RAUS SHARIF AND HELILIAH JJCA
16 MAY 2008

Criminal Law — Dangerous drugs — Trafficking — Whether there was a nexus between appellant and bag containing cannabis found in car — Whether trial judge erred in ruling cautioned statement admissible — Whether s 114(g) of the Evidence Act 1950 should apply when prosecution failed to call co-travellers as witnesses — Whether presumption of trafficking proved — Dangerous Drugs Act 1952 ss 37(da) & 39B(1)(a) — Evidence Act 1950 s 114(g)

Evidence — Presumption — Failure to call witness — Whether failure to call co-travellers in car gave rise to adverse inference — Evidence Act 1950 s 114(g)

Evidence — Statement — Cautioned statement — Whether trial judge erred in ruling cautioned statement admissible — Voluntariness

The appellant and three others were arrested at a police road block along Jelebu, Negeri Sembilan. A search on the appellant and the other three co-travellers revealed that both the appellant and one other were carrying a packet containing suspected cannabis in their trouser pockets. A search of the motorcar that the appellant and the three were travelling in led to the discovery of a 'Puma' bag ('the bag') which contained a packet of suspected cannabis, an outpatient card issued by the Kajang Hospital in the name of the appellant, a sick-leave certificate in the name of the appellant issued by the same hospital and a bunch of keys. The appellant and the three other co-travellers were thereafter arrested and brought to the police headquarters. Further investigation revealed that the packet seized from the bag was 366.1g of cannabis as defined under s 2 of the Dangerous Drugs Act 1952 ('DDA'). In the course of investigation, a cautioned statement under s 37A(1)(b) of the DDA was recorded from the appellant. The appellant was subsequently charged with the offence of trafficking in 366.1g of cannabis under s 39B(1)(a) of the DDA. Evidence adduced in the course of the trial established that the bunch of keys in the bag belonged to the appellant. At the

trial, a trial within a trial was also held to consider the admissibility of the cautioned statement. At the end of the trial within a trial, the trial judge ruled that the making of the cautioned statement was not caused by any inducement, threat or promise and was voluntarily given and hence admissible. At the close of the prosecution case, the trial judge found that the prosecution had made out a prima facie case against the appellant on the charge of trafficking and hence called upon the appellant to enter his defence. The appellant who elected to give evidence on oath stated that the bag belonged to Aman, who was one of the other three co-travellers apprehended in the car. In relation to his outpatient card, his sick leave certificate and the bunch of keys that were found in the bag, the appellant said that he had handed them to Aman for safekeeping when they embarked on the trip. The appellant also admitted that he was a drug addict and that he obtained his supply of cannabis from Aman. At the conclusion of the trial, the trial judge found that the appellant had failed to cast a reasonable doubt and found him guilty and convicted him on the charge of trafficking. Hence this appeal wherein the appellant contended that the trial judge had erred in ruling that the cautioned statement was admissible because there was no evidence that the actual words of the caution under s 37A(1)(b) of the DDA were administered and because the trial judge had not given any reasons why the cautioned statement was admissible; that two of the co-travellers, ie Aman and Zubir, were never called by the prosecution as witnesses and hence s 114(g) of the Evidence Act 1950 ('the Act') should apply and; that there was no element or evidence of trafficking.

Held, dismissing the appeal:

(1) The evidence in the instant appeal showed that the actual words of the caution under s 37A(1)(b) were administered by the Chief Inspector who recorded the cautioned statement made by the appellant. In the instant appeal, the Chief Inspector had testified that prior to recording the cautioned statement from the appellant he had administered the caution and consequently asked the appellant whether he understood the caution. Upon getting a positive answer he had asked the appellant whether he wanted to give a statement. Thereafter he had also asked the appellant whether he was induced, threatened or promised to give a statement and to this the appellant had answered that he was willing to give a statement as he was the one who did it and did not want to involve his other three friends. Furthermore, both the appellant and the Chief Inspector had affixed their respective signatures to that part of the cautioned statement wherein the caution under s 37A(1)(b) of the DDA was also reproduced. In the cases in support cited by the appellant the facts denote that the services of an interpreter were used in the recording of the cautioned statement whereas in the instant appeal the

appellant and the Chief Inspector were speaking in their mother tongue and there was no requirement for the services of an interpreter. As such, the facts of the present case would denote that the appellant was aware that he was not obliged to say anything or to answer any questions and that anything he said may be used as evidence (see paras 35–41).

(2) The facts in the instant appeal showed a nexus between the appellant and the contents of the bag containing the cannabis, in that, the outpatient card issued by the Kajang Hospital in the name of the appellant and the sick leave certificate in the name of the appellant issued by the same hospital were in the bag. In addition, the evidence showed that one of the keys in the bunch of keys recovered from the bag could be used to gain entry to the house the appellant was staying in. Furthermore there was no claim on the part of the appellant that he had fabricated the incriminating admission (see para 42).

(3) Based upon what has been elucidated at the trial it was clear that the trial judge was right in his ruling that the cautioned statement was admissible. There was nothing in the instant appeal to show that the cautioned statement was not voluntarily given. There being no inducement, threat or promise from a person in authority and there being no suspicious circumstances surrounding the making or recording of the cautioned statement, the trial judge was correct in ruling that the cautioned statement was voluntarily made and as such admissible (see para 52).

(4) The evidence adduced by the prosecution had clearly established that the appellant was in possession of the cannabis kept in the bag because it had already been proven that the bag and its contents belonged to the appellant. As such, the trial judge was correct in finding that the prosecution had proven that the appellant was in possession of the cannabis and that it was in his custody. It was also clear that since the cannabis recovered was in excess of 200g this would trigger the statutory presumption of trafficking as provided in s 37(da) of the DDA. Therefore the trial judge was right in concluding that the appellant was guilty of the offence as per the charge (see paras 53–56).

(5) The appellant's contention that the prosecution's non-calling of his two co-travellers in the car, Aman and Zubir, brought into play s 114(g) of the Act holds no weight. There were no merits in such an argument. The law in relation to the calling of witnesses by the prosecution is well-settled. The prosecution has a discretion as to what witnesses should be called for the prosecution and the court will not interfere with the exercise of that discretion. Under the circumstances, s 114(g) of the Act would not apply (see para 57).

[Bahasa Malaysia summary

Perayu dan tiga yang lain telah ditahan ketika polis melakukan sekatan jalan raya di sepanjang jalan Jelebu Negeri Sembilan. Pemeriksaan terhadap perayu dan tiga rakan yang lain telah mendedahkan bahawa kedua-dua perayu dan seorang yang lain membawa paket yang disyaki mengandungi kanabis di dalam poket seluar mereka. Pemeriksaan kereta yang digunakan oleh perayu dan ketiga-tiga untuk mengembara membawa kepada penemuan beg 'Puma' ('beg'), yang mengandungi satu paket yang disyaki kanabis, kad pesakit luar yang dikeluarkan oleh Hospital Kajang di atas nama perayu, sijil cuti sakit di atas nama perayu yang dikeluarkan oleh hospital yang sama dan segugus kunci. Perayu dan tiga rakannya kemudiannya telah ditahan dan dibawa ke ibu pejabat polis. Siasatan lanjut telah mendedahkan bahawa bungkusan yang dirampas daripada beg tersebut adalah kanabis seberat 366.1g seperti yang didefinisikan di bawah s 2 Akta Dadah Berbahaya 1952 ('ADB'). Semasa siasatan, pernyataan beramaran di bawah s 37A(1)(b) ADB telah direkodkan daripada perayu. Perayu kemudiannya telah didakwa atas kesalahan mengedar kanabis seberat 366.1g di bawah s 39B(1)(a) ADB. Keterangan yang dikemukakan semasa perbicaraan membuktikan bahawa segugus kunci di dalam beg tersebut adalah milik perayu. Semasa perbicaraan, perbicaraan di dalam perbicaraan juga telah dijalankan untuk mempertimbangkan kebolehterimaan pernyataan beramaran. Di akhir perbicaraan dalam perbicaraan, hakim perbicaraan telah memutuskan bahawa pembuatan pernyataan beramaran tidak disebabkan oleh apa-apa dorongan, ancaman atau perjanjian dan telah diberikan secara sukarela, oleh yang demikian adalah boleh diterima. Semasa penutupan kes pendakwaan, hakim perbicaraan mendapati bahawa pihak pendakwaan telah berjaya membuktikan kes prima facie terhadap perayu atas dakwaan mengedar dan perayu telah dipanggil untuk memasukkan pembelaannya. Perayu yang mana telah memilih untuk memberikan keterangan secara bersumpah menyatakan bahawa beg tersebut adalah kepunyaan Aman, salah seorang daripada tiga rakannya yang telah diberkas di dalam kereta. Berkenaan dengan kad pesakit luar, sijil cuti sakitnya dan segugus kunci yang ditemui di dalam beg, perayu menyatakan bahawa perayu telah menyerahkannya kepada Aman untuk disimpan apabila mereka memulakan perjalanan. Perayu juga mengakui bahawa perayu adalah seorang penagih dadah dan bekalan kanabis diperolehnya daripada Aman. Di akhir perbicaraan, hakim perbicaraan telah mendapati bahawa perayu telah gagal untuk menimbulkan keraguan yang munasabah dan memutuskan perayu bersalah dan menyabitkannya atas dakwaan mengedar. Maka dalam rayuan ini, perayu menegaskan bahawa hakim perbicaraan telah terkhilaf dalam memutuskan bahawa pernyataan beramaran boleh diterima kerana tidak terdapat keterangan mengenai pernyataan beramaran yang sebenar di bawah s 37A(1)(b) ADB diberikan dan kerana hakim perbicaraan tidak memberikan sebab kenapa pernyataan

beramaran tersebut boleh diterima; dua rakan perayu iaitu Aman dan Zubir tidak pernah dipanggil oleh pihak pendakwaan sebagai saksi dan oleh itu s 114(g) Akta Keterangan 1950 ('Akta') seharusnya terpakai; dan tidak terdapat elemen atau keterangan berkenaan dengan pengedaran.

Diputuskan, menolak rayuan:

(1) Keterangan di dalam rayuan ini menunjukkan bahawa pernyataan beramaran yang sebenar di bawah s 37A(1)(b) telah diberikan oleh Ketua Inspektor yang telah merekodkan pernyataan beramaran yang telah dibuat oleh perayu. Dalam rayuan ini, Ketua Inspektor telah memberikan keterangan bahawa sebelum merekodkan pernyataan beramaran daripada perayu, beliau telah memberikan amaran tersebut dan seterusnya telah bertanya kepada perayu sama ada memahami amaran tersebut. Selepas mendapatkan jawapan yang positif beliau telah bertanya kepada perayu sama ada perayu hendak memberikan kenyataan. Selepas itu beliau juga bertanya kepada perayu sama ada perayu didorong, diancam atau dijanjikan sesuatu untuk memberikan kenyataan yang perayu adalah orang yang melakukannya dan tidak mahu melibatkan tiga orang rakannya yang lain. Tambahan pula, kedua-dua perayu dan Ketua Inspektor telah menurunkan tandatangan masing-masing di bahagian dalam pernyataan beramaran di bawah s 37A(1)(b) ADB begitu juga salinannya. Dalam kes sokongan yang dirujuk oleh perayu, fakta menunjukkan bahawa perkhidmatan seorang penterjemah telah digunakan dalam merekodkan pernyataan beramaran, manakala di dalam rayuan ini perayu dan Ketua Inspektor bercakap menggunakan bahasa ibunda dan tidak memerlukan perkhidmatan penterjemah. Oleh itu, fakta kes ini menunjukkan bahawa perayu adalah sedar bahawa perayu tidak diwajibkan untuk berkata apa-apa atau menjawab mana-mana soalan dan segala yang dikatakan boleh digunakan sebagai keterangan (lihat perenggan 35-41).

(2) Fakta dalam rayuan ini menunjukkan hubungan di antara perayu dan kandungan dalam beg yang mengandungi kanabis, di mana di dalamnya terdapat kad pesakit luar atas nama perayu yang dikeluarkan oleh Hospital Kajang dan sijil cuti sakit atas nama perayu yang dikeluarkan oleh hospital yang sama, ada di dalam beg tersebut. Selanjutnya, keterangan menunjukkan bahawa salah satu daripada gugusan kunci-kunci yang ditemui dalam beg tersebut boleh digunakan untuk memasuki rumah yang dihuni oleh perayu. Tambahan pula, tidak terdapat dakwaan pihak perayu bahawa perayu telah mereka pengakuan bersalahnya (lihat peranggan 42).

(3) Berdasarkan kepada apa yang telah diterangkan semasa perbicaraan adalah jelas bahawa keputusan hakim perbicaraan adalah benar, dalam menerima masuk pernyataan beramaran. Tidak terdapat langsung di dalam rayuan ini untuk menunjukkan pernyataan beramaran tersebut telah diberikan tanpa kerelaan. Tidak terdapat dorongan, ancaman atau janji daripada orang yang berpengaruh dan tiada keadaan sekeliling yang menimbulkan syak dalam pembuatan atau rakaman pernyataan beramaran tersebut, hakim bicara adalah benar dalam keputusannya yang mana pernyataan beramaran telah dibuat secara sukarela dan oleh yang demikian ianya adalah boleh diterima (lihat peranggan 52).

(4) Keterangan yang dikemukakan oleh pihak pendakwaan secara jelas membuktikan bahawa perayu adalah pemilik kepada kanabis yang disimpan di dalam beg tersebut kerana ianya telah dibuktikan bahawa beg dan isi kandungannya adalah kepunyaan perayu. Oleh yang demikian, hakim perbicaraan adalah benar dalam keputusannya bahawa pihak pendakwaan telah membuktikan bahawa perayu adalah pemilik kanabis dan ianya di dalam jagaannya. Adalah jelas bahawa apabila kanabis ditemui melebihi 200g, ini mencetuskan anggapan statutori pengedaran seperti yang diperuntukkan di dalam s 37(da) ADB. Oleh itu hakim perbicaraan adalah benar dalam menyimpulkan bahawa perayu adalah bersalah atas kesalahan seperti mana pertuduhan (lihat perenggan 53–56).

(5) Penegasan perayu bahawa kegagalan memanggil dua rakannya Aman dan Zubir oleh pihak pendakwaan, membangkitkan s 114(g) Akta tidak mempunyai keberatan. Tidak terdapat merit dalam pernyataan tersebut. Perundangan yang berkaitan dengan pemanggilan saksi-saksi oleh pihak pendakwaan adalah ditetapkan. Pihak pendakwaan mempunyai budi bicara berkenaan dengan saksi yang perlu dipanggil untuk pihak pendakwaan dan mahkamah tidak akan masuk campur dengan pelaksanaan budi bicara tersebut. Di bawah keadaan tersebut, s 114(g) Akta adalah tidak terpakai (lihat perenggan 57).]

Notes

For a case on failure to call witness, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2053.

For cases on cautioned statement, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2385–2402.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Chan Ming Cheng v PP [2002] 3 MLJ 733 (refd)
Hasibullah bin Mohd Ghazali v PP [1993] 3 MLJ 321 (refd)
Khoon Chye Hin v PP [1961] MLJ 105 (refd)

Mohamed Kassim v Reg [1956] MLJ 212 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Pichi Muthu, Re [1970] 2 MLJ 143 (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576 (folld)
PP v Ooi Teng Chuan [2005] 4 CLJ 557 (refd)
Tan Boon Teck v PP [1950] MLJ 44 (refd)
Tan Ewe Huat v PP [2004] 1 MLJ 559 (distd)
Teh Lee Tong v Rex [1956] MLJ 194 (folld)
Wong Mee Sieng v PP [1999] MLJU 300 (refd)

Legislation referred to
Criminal Procedure Code s 112
Dangerous Drugs Act 1952 ss 2, 37(da), 37(da)(vi), 37A(1)(b), 39B(1)(a), 39B(2)
Evidence Act 1950 ss 91, 92, 114(g)

Appeal from: Criminal Trial No 45–6 of 2001 (High Court, Seremban)

Rajinder Singh a/l Gurbachan Singh (Morthi, Segaran & Co) for the appellant.
Nurulhuda Nur'aini Mohd Noor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] This is the unanimous judgment of the court.

[2] The appellant was charged in the High Court, Seremban with an offence of trafficking of dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), to wit, 366.1g of cannabis and punishable under s 39B(2) of the same.

[3] At the end of the trial he was found guilty and convicted and was sentenced to death. The appellant appealed to this court.

THE PROSECUTION'S CASE

[4] The facts of the case are as follows. On 11 March 2000 at about 4pm a group of police personnel led by Inspector Md Yunos bin Md Jeni ('SP4') set up a roadblock along Jalan Kongkoi-Genting Peras, Jelebu, Negeri Sembilan. At about 6.50pm they stopped a motorcar bearing registration No BED 2621. The driver of the said motorcar was one Shafawi ('SP8') and there were three passengers. One Zubir was seated in the front seat next to the driver and one Aman occupied the back seat behind the driver whilst the

appellant occupied the back seat behind the front seat passenger, ie Zubir. They were ordered to alight from the said motorcar.

[5] SP4 conducted a search on the appellant and the other three persons and discovered a packet containing plant material which he suspected to be cannabis in the trousers pocket of SP8. SP4 also discovered a packet containing similar substance in the left trousers pocket of the appellant. He then conducted a search on the said motorcar and discovered a 'Puma' bag ('the said bag') underneath the driver's seat which contained a packet of plant material which he suspected to be cannabis, an outpatient card issued by the Kajang Hospital in the name of the appellant and a sick-leave certificate in the name of the appellant issued by the same hospital and a bunch of keys.

[6] The appellant, SP8, Aman and Zubir were arrested and brought to the Jelebu police district headquarters. They were subsequently handed over to SP6, the investigating officer of the case together with the exhibits seized who then brought them to the police contingent headquarters ('IPK') in Seremban.

[7] Further investigation showed that the packet containing plant material found in the said bag was 366.1g of cannabis ('the said dangerous drugs') as defined under s 2 of the Act. In the course of investigation, a cautioned statement under s 37A(1)(b) of the Act was recorded from the appellant on 13 March 2000 at about 3.40pm. The appellant was subsequently charged in the High Court, Seremban with an offence of trafficking of the said dangerous drugs under s 39B(1)(a) of the Act.

[8] In the course of trial, evidence was introduced to show that the appellant's sister (SP10) had given a spare key of her house to the appellant. This spare key was amongst the bunch of keys that was discovered in the said bag. In her evidence, SP10 confirmed that the appellant was residing in her house at the material time.

[9] SP1, the chemist who conducted an examination of the packet containing the plant material found in the said bag confirmed that it was 366.1g of cannabis as defined under s 2 of the Act.

[10] In the course of trial, the prosecution tendered the cautioned statement made by the appellant. The learned trial judge ordered that a trial within a trial be held to determine its admissibility. At the end of the day, he ruled that the making of the cautioned statement was not caused by any inducement, threat or promise and was voluntarily given and hence admissible.

[11] In the cautioned statement, the appellant stated as follows: **A**

Pada 9 Mac 2000 petang Khamis saya ada ke rumah kawan saya nama Syafawi di Taman Cheras Jaya Fasa I Balakong dan minta dia cari kereta untuk hantar saya balik ke Jengka Pahang dan dia berjanji untuk mencarinya. Selepas itu saya pun balik ke rumah di Semenyeh. **B**

Pada 10 Mac 2000 pagi hari Jumaat sekali lagi saya ke rumah Syafawi bertanyakan kereta yang dicari dan dia beritahu saya ada dapat kereta pinjam dari abang ipar dia sendiri.

Kemudiannya saya janji untuk datang esok untuk balik ke Jengka dan saya duduk di rumah dia hingga jam lebih kurang 9.00 malam. **C**

Pada hari itu juga jam lebih kurang 9.00 malam saya dengan menunggang motosikal sendiri pergi ke Ulu Langat tujuan untuk beli dadah ganja dengan tujuan mahu bawa balik ke Jengka.

Saya beli dadah ganja itu dari satu lelaki Melayu nama panggilan Alim dengan harga RM700 berat agak-agak dalam 400g lebih. **D**

Saya bawa bungkusan dadah ganja itu ke rumah adik ipar saya tempat saya menumpang di Semenyeh.

Sampai di rumah di Semenyeh dadah ganja itu saya balutkan dengan kertas surat khabar dan saya salutkan dengan *sellotape*. **E**

Bungkusan ganja itu kemudiannya saya masukan dalam beg warna hitam jemana Puma.

Dalam beg tersebut juga ada saya simpan salinan sijil cuti sakit bertarikh 24 Februari 2000–23 Mac 2000 dari Hospital Kajang dan satu kad rawatan dari Hospital Kajang juga sebab saya dalam rawatan. **F**

Selain itu dalam beg hitam itu juga saya ada simpan tiga batang anak kunci rumah di Semenyeh.

Beg itu kemudiannya saya letakkan dalam bilik saya dan selepas itu lebih kurang 12.00 tengah malam saya keluar semula pergi ke rumah Syafawi di Taman Cheras Jaya. **G**

Saya tidur malam itu di rumah Syafawi.

Pada 11 Mac 2000 lebih kurang jam 8.00 pagi abang ipar Syafawi datang hantar kereta iaitu kereta Iswara Aeroback warna putih No BED 2621 dan selepas hantar kereta dia pun balik. **H**

Pada hari itu jam lebih kurang 3.00 petang saya tumpang kereta itu yang di pandu oleh Syafawi pergi ke rumah kawan saya juga nama Zubir di Taman Cheras Jaya Fasa 3 tidak jauh dari situ. **I**

Sampai di rumah Zubir ambil dia naik kereta yang sama balik semua ke rumah Syafawi. Masa tiba di rumah Syafawi dapati kawan saya jua nama Aman bin Ideris seperti di janjikan telah menunggu bersama teman perempuannya nama panggilan Su.

Saya dan kawan-kawan naik kereta tersebut dipandu oleh Syafawi, duduk depan kiri ialah Su, duduk di belakang kanan ialah Aman, duduk tengah ialah saya dan duduk kiri Zubir.

Kami pun terus pergi ke rumah saya di Semenyeh dan tiba di rumah, saya keluar kereta pergi ambil beg saya dalam bilik warna hitam yang telah saya simpan dadah ganja itu dan satu beg lagi warna *pink* berisi pakaian.

Kemudiannya beg pakaian itu saya masukkan dalam but kereta beg hitam Puma yang berisi bungkusan dadah ganja itu saya letakkan di bawah tempat duduk pemandu masukkan dari belakang.

Seterusnya saya masuk dalam kereta duduk di tempat yang saya iaitu di tengah belakang.

Kemudianya kami terus pergi ke Kelana Jaya hantar Su ke rumah adiknya. Selepas tiba di Kelana Jaya hantar Su, Zubir tukar tempat duduk depan kiri sebelah pemandu, saya duduk belakang kiri dan di sebelah kanan saya ialah Aman.

Kemudiannya saya pun berlepas dari Kelana Jaya dengan kereta BED 2621 dipandu oleh Syafawi untuk terus ke Jengka Pahang lalu Batu 9 Cheras dan terus ke Jalan Genting Peras-Kuala Klawang.

Lebih kurang hampir jam 7.00 malam saya tiba di Jalan Genting Peras dekat dengan satu jambatan km berapa tidak ingat masa itu ada satu *road block* Polis.

Kami pun berhenti dan saya nampak ada lebih kurang sepuluh orang semuanya pakaian biasa dan mereka kenalkan diri polis.

Polis tersebut periksa kami empat orang dan polis ada jumpa dadah dari poket seluar sebelah kiri iaitu seluar yang saya pakai, saya juga mengaku saya ada bawa dadah ganja dalam beg beg hitam bawah tempat duduk pemandu.

Polis rampas beg hitam itu dan periksa dalamnya memang ada bungkusan dadah ganja yang saya bawa.

Polis juga jumpa bungkusan kertas berisi dadah ganja di tepi sebelah kiri tempat duduk depan kiri.

Bungkusan ganja itu pada mulanya saya berikan kepada Zubir sebelum tiba di *road block* itu, dan bila nampak *road block*, Zubir terus letakkan di tepi tempat duduk sebelah kiri.

Masa kena tahan saya memang terus mengaku kepada polis dadah ganja itu saya yang punya.

Kami berempat polis tangkap dan rampas semua dadah ganja itu bawa balik ke Balai Polis Kuala Klawang.

Itulah sebabnya saya ditahan sekarang. Itu sahaja yang hendak saya terangkan.

[12] In his evidence, SP8 who was driving the said motorcar on the day of the incident stated that the vehicle belonged to his brother-in-law, one Abdul Kadir Jelani bin Salleh. On the day of the incident he had borrowed the said

motorcar and was driving to Pahang when he was stopped by the police at the roadblock. He confirmed that Zubir, Aman and the appellant were passengers in the said motorcar when it was stopped by the police. He stated that the said bag including its contents did not belong to him.

[13] SP11, an officer with the medical records section of the Kajang Hospital confirmed that the outpatient card, which was recovered from the said bag, was issued to the appellant. He stated that the records showed that the appellant was admitted to the hospital on 4 December 1999 and was discharged on 11 December 1999. Based upon what was stated in the outpatient card, SP11 said that the appellant was supposed to have come for a medical checkup on 23 March 2000. He also confirmed that the sick-leave medical certificate, which was also found in the said bag, was issued to the appellant.

[14] Aman and Zubir were not called by the prosecution to give evidence as subpoenas to compel their attendance in court for the trial could not be served. With regards to this, SP6, the investigation officer of the case stated in his evidence that he did not record any statement under s 112 of the Criminal Procedure Code from Aman and Zubir. SP6 also stated that his records showed that Zubir was charged with possession of dangerous drugs found on him on the day of the incident and was fined RM4,000. SP8 was also charged for possession of dangerous drugs found on him and was fined the same amount.

[15] The minutes of proceedings of the learned trial judge showed that both Aman and Zubir, amongst others, were offered as witnesses by the prosecution to the defence. The minutes also showed that defence counsel informed the court that he does not require any of the witnesses offered.

[16] At the close of the case for the prosecution, the learned trial judge found that the prosecution had made out a prima facie case against the appellant on the charge of trafficking and hence called upon the appellant to enter on his defence.

THE DEFENCE CASE

[17] The appellant elected to give evidence on oath. In his defence the appellant stated that on 11 March 2000 he was residing in Balakong, Taman Cheras Jaya together with Syafawi and three others. Prior to February 2000 he was residing in SP10's house in Semenyeh. In the year 2000, SP10 handed to him a pair of spare keys to her house.

[18] In his evidence, the appellant said that the said bag belonged to Aman. In relation to his outpatient card, his sick leave certificate and the bunch of keys which were found in the said bag, the appellant said that he had handed them to Aman for safe keeping when they embarked on the trip to Jengka. Aman then kept the said items in the said bag. The appellant also said that he is a drug addict and started smoking cannabis in 1995. He smoked three times a week and obtained his supply of cannabis from Aman.

[19] At the conclusion of the trial, the learned trial judge, after considering all the evidence adduced before him, found that the appellant failed to cast a reasonable doubt and concluded that the prosecution has proved its case beyond reasonable doubt and accordingly found him guilty and convicted him on the charge of trafficking.

THE APPEAL

[20] Before us, learned counsel for the appellant canvassed the following arguments, namely:

(a) that the cautioned statement is inadmissible as there was no evidence that the actual words of the caution as provided for under s 37A(1)(b) of the Act was administered; further, the learned trial judge did not give reasons as to why he ruled that the cautioned statement is admissible;

(b) that Aman and Zubir were never called by the prosecution as witnesses and hence s 114(g) of the Evidence Act 1950 should apply; and

(c) that there was no element or evidence of trafficking; further, the appellant himself admitted that he is a drug addict.

THE CAUTIONED STATEMENT

[21] In the course of the trial within a trial, Chief Inspector Hamidon Ali ('SPT1'), who at the material time was attached to the Narcotics Department, IPK, Seremban stated that at the request of SP6, he went to the Jelebu police district headquarters on 13 March 2000. At about 3.40pm the same day, he commenced recording the cautioned statement made by the appellant.

[22] SPT1 said that the appellant was handcuffed when he was brought to the room which he utilised to record the cautioned statement by one Lance Corporal Hatta ('SPT2'). He directed SPT2 to unlock the handcuffs and to close the door to the room and to wait outside. He then requested the appellant to be seated. SPT1 testified as to what transpired subsequently as follows:

Saya telah bertanyakan butir-butir diri OKT. Saya ada catitkan butir-butir ini dalam borang POL 51C. **A**

OKT menyatakan dia bekerja sebagai posman. Tiada apa-apa kesukaran bagi kami memahami antara satu sama lain.

Saya tanyakan keadaan kesihatannya. Dia mengatakan dia sihat. Tiada apa kesan kecederaan pada badannya. **B**

Sebelum merakamkan percakapan saya memberikan amaran kepada OKT mengikut s 37A(1)(b) ADB 1952 yang berbunyi:

> Adalah kewajipan saya memberi amaran kepada kamu bahawa kamu tidaklah diwajibkan berkata apa-apa jua atau menjawab apa-apa soalan. Tetapi apa-apa jua yang kamu katakan sama ada sebagai jawapan kepada sesuatu soalan atau tidak boleh diberi sebagai keterangan. **C**

Saya ada catitkan amaran ini dalam I/D 20. Saya bertanya OKT sama ada dia faham amaran tersebut. OKT jawap saya faham. Saya bertanya lagi 'adakah kamu mahu memberikan keterangan kepada saya?' Dia jawab dia mahu. **D**

Saya bertanya OKT 'adakah kamu diugut, dipaksa atau dipujuk supaya beri keterangan kepada saya?' OKT jawab 'saya dengan rela hati untuk berikan keterangan ini sebab saya yang buat dan saya tidak mahu melibatkan tiga orang kawan saya'. **E**

Saya ambil tandatangan OKT dan saya sendiri tandatangani di bawah kenyataan ini.

Setelah tandatangan saya tanya OKT 'apakah keterangan yang hendak kamu beritahu saya?' Apa yang diberitahu kepada saya saya mulalah menaipnya. **F**

Saya selesai merakamkan pada jam 4.45 petang.

Saya tanya OKT adakah keterangan kamu ini benar. Dia beritahu semuanya benar.

Saya tanya OKT sama ada dia ingin membuat pindaan atau tambahan. Dia jawab tiada. Dia dan saya tandatangani percakapan tersebut. **G**

Saya tidak mengugut atau memaksa atau memujuk OKT untuk beri keterangan ini. Saya tidak ada marah atau meninggikan suara saya semasa mengambil keterangan ini.

H

[23] Under cross-examination SPT1 said as follows:

Saya tidak catitkan dalam borang percakapan ini di mana saya arahkan Kpl Hatta membuka gari OKT.

Saya ada jalankan pemeriksaan badan ke atas OKT — tidak secara menyeluruh. Ini saya tidak catitkan di dalam I/D20. Semasa pemeriksaan fisikal saya tak nampak sebarang parut atau kecederaan pada bahagian kaki OKT. **I**

A Saya tak ada tanya OKT sama ada dia ingin buat aduan kepada saya. Tak benar saya tidak jalankan pemeriksaan fisikal ke atas OKT. Saya pasti OKT rela dibawa ke hadapan saya. OKT sendiri mengaku sedemikian.

Sebelum ini saya tidak ada jumpa OKT di lokap. Kali pertama saya jumpa OKT ialah semasa percakapan diambil.

B Saya hanya bertanyakan butir-butir diri OKT sahaja. Tidak benar OKT enggan bekerjasama dengan saya.

OKT tidak menunjukkan keadaan ketakutan atau risau dan tidak ada menangis di hadapan saya.

C OKT tidak ada beritahu saya bahawa dia ingin bercakap dengan ayahnya. OKT tidak pernah meminta bercakap dengan ayahnya melalui nombor 09–4861458.

OKT tidak ada mengatakan kepada saya bahawa kakinya sakit dan ingin mendapat rawatan doktor.

D OKT tidak ada minta pil penahan sakit. Saya tak ada berikan OKT dua biji Panadol.

Tak benar saya telah berbual dengan OKT selama 15 minit sebelum taip percakapan.

E Saya ada terangkan amaran berkenaan kepada OKT. Perkataan yang saya gunakan untuk menerangkan saya tak catit dalam I/D 20. Saya terangkan kepada OKT hak beliau untuk berdiam diri.

Tidak benar saya ada tanya OKT 1–10 soalan yang lain sebelum saya mula mencatitkan percakapan OKT.

F Selepas amaran saya tanya OKT sama ada dia faham. Dia jawab dia faham. Saya ada tanya OKT apa yang dia faham. OKT jawab dia faham.

OKT yang beritahu saya di mana dia beli ganja, harga ganja dan berat ganja.

C/Insp Taruna tidak ada berikan laporan polis kepada saya pada 13 Mac 2000.
G Nombor repot yang tercatit di dalam I/D 20 ini saya bertanyakan kepada Insp Taruna.

Saya diberitahu tangkapan adalah mengenai kes dadah. Saya diberitahu semasa dia telefon saya dan jumpanya.

H **[24]** Under re-examination SPT1 said as follows:

Untuk mengetahui nombor repot dan balai mana, saya tak perlu membaca repot itu sendiri. Saya tak catitkan, saya ada meminta L Kpl Hatta buka gari OKT kerana saya tak terfikir mengenai perkara ini.

I Saya tidak suruh OKT buka baju dan seluar untuk diperiksa. Tanpa buka seluar saya nampak kecederaan di kaki OKT.

Saya tak buka baju dan seluar OKT kerana saya telah tanyakan OKT keadaannya. Dia jawab dia sihat.

[25] SPT2 testified that when he handed the appellant to SPT1, he was asked to unlock the handcuffs and to wait outside the room.

[26] In his evidence during the trial within a trial, the appellant said that after he was arrested, he never informed the police that he wanted to give a statement; the following was what he said:

Pada 11 Mac 2000 saya telah ditangkap oleh polis. Saya tulis 'percakapan' maksudnya ialah perbualan di antara saya dengan pihak polis.

Selepas ditangkap saya tidak ada beritahu pihak polis bahawa saya ingin memberi percakapan.

Selepas ditangkap saya ada dibawa berjumpa C/Insp Hamidon pada 13 Mac 2000 lebih kurang 3.30 petang. Saya jumpa dia bukan atas kerelaan saya. Pada masa tersebut saya telah dibawa keluar oleh seorang anggota polis dari lokap Jelebu ke satu bilik. C/Insp Hamidon ada di situ. Itulah kali pertama saya jumpa dia.

Tangan saya bergari semasa dibawa jumpa C/Insp Hamidon. C/Insp Hamidon perkenalkan dirinya. Dia tidak suruh saya buat apa-apa. Dia suruh saya duduk atas kerusi.

C/Insp Hamidon arahkan polis yang bawa saya itu keluar dari bilik tersebut. Semasa berada bersama dengan C/Insp Hamidon tangan saya masih bergari di hadapan.

Saya ada beritahu C/Insp Hamidon bahawa kaki saya sakit dan perlukan rawatan. Kaki saya sakit disebabkan kemalangan jalan raya. Yang sakit iaIah kaki kiri di bahagian lutut.

Saya telah mendapat rawatan di Hospital Kajang.

(Rujuk 1 laporan bertarikh 19 Februari 2001)

Saya mendapat kepatahan kaki kiri. Telah menjalankan pembedahan kaki kiri — DTI.

Pembedahan dilakukan pada 8 Disember 1999.

Saya telah diberi cuti sakit sehingga 23 Mac 2000. Saya diberi ubat penahan sakit dan antibiotik.

Semasa jumpa C/Insp Hamidon saya berada dalam keadaan runsing, takut, sebab tak tahu macam mana keadaan nasib saya, keluarga saya dan pekerjaan saya. Semasa saya berada bersama C/Insp Hamidon saya tak dibenarkan bercakap dengan sesiapa. Saya tidak diberi peluang untuk menghubungi sesiapa. C/Insp Hamidon ada menghubungi ayah saya melalui telefon di pejabat tersebut. Dia menghubungi rumah saya melalui nombor 09-4861458. Saya telah diberi peluang untuk bercakap dengan ayah saya.

C/Insp Hamidon telah memperkenalkan dirinya dan mempelawa ayah saya datang berjumpa. Saya menangis, suara saya terketar-ketar. Dia memujuk saya supaya memberi kerjasama. Dia minta butir-butir peribadi saya dengan menaip. Saya tak lihat apa yang ditaipnya. Selepas dia menaip dia tidak ada minta saya tandatangan.

C/Insp Hamidon tidak ada beri saya apa-apa amaran sebelum menaip percakapan saya. C/Insp Hamidon tidak ada beritahu saya hak saya berdiam diri dan tidak menjawab soalan beliau.

(Rujuk I/D 20 baris pertama).

Saya faham tentang apa-apa amaran yang diberikannya. Dia tidak ada memberi apa-apa amaran kepada saya.

C/Insp Hamidon berjanji akan beri saya penahan sakit dan jumpa keluarga saya.

Dengan perkataan 'keterangan' fahaman saya ialah memberi percakapan yang benar.

Adalah tidak benar bahawa saya ada beri kenyataan bahawa 'saya yang buat dan tidak mahu libatkan kawan saya'.

Selain dari Insp Hamidon ada orang lain yang memujuk saya untuk beri percakapan iaitu Zubir dan Aman.

(Muka surat 2–3 I/D20).

Selepas soalan di muka surat 2 baris ke 23 C/Insp Hamidon ada tanya beberapa soalan lain. Dia tanya saya harga dan berat dadah dan tentang kawan-kawan saya dan peristiwa-peristiwa pada 9 Mac 2000, 10 Mac 2000 dan 11 Mac 2000. Soalan-soalan ini tak ada dalam muka surat 2–3 I/D 20.

Selepas rakaman percakapan tersebut tidak dibacakan semula kepada saya.

[27] Under cross-examination, the appellant said as follows:

Akibat kemalangan saya diberi cuti sakit sehingga 23 Mac 2000.

(Rujuk SDT1).

Ini adalah Iaporan kecederaan saya. Tidak ada disabitkan dalam Iaporan ini.

(Rujuk P12A-B).

M/C ini mengandungi nama saya. Saya sahkan m/c ini kepunyaan saya.

Saya diberi ubat untuk dimakan dua kali sehari iaitu satu kali pagi dan satu kali petang iaitu waktu pagi 3 pagi dan malam lebih kurang 8–9 malam.

Pada tarikh saya ditahan ubat saya dah habis — sehari dua sebelum tarikh tersebut.

Setelah saya kehabisan ubat tahan sakit saya, saya tidak pergi ke hospital untuk ambil buat lagi.

Pada 11 Mac 2000 saya bertolak dari KL ke Pahang balik kampung, satu perjalanan yang jauh.

[28] The transcript of the learned trial judge in the course of cross-examination of the appellant by the learned deputy public prosecutor then read as follows:

Put: Kamu tidak ambil bekalan ubat yang baru dan sanggup berjalan jauh kerana kamu tidak sakit.

Jawapan: Tak setuju.

Put: Kamu tidak perlu lagi ubat-ubat itu kerana kamu tidak sakit.

Jawapan: Tak setuju.

Saya ada beritahu C/Insp Hamidon bahawa saya ada mengalami kemalangan jalan raya.

Put: Tidak benar C/Insp Hamidon ada gunakan telefon kerana dalam bilik tersebut tiada telefon.

Jawapan: Tak benar.

Put: C/Insp Hamidon telah bacakan amaran kepada awak.

Jawapan: Tiada.

Put: Hak kamu untuk berdiam diri jelas terdapat dalam amaran tersebut.

Jawapan: Tidak.

Put: C/Insp Hamidon telah bacakan percakapan itu sebelum dia tanya kamu samaada kamu ada nak buat pindaan.

Jawapan: Tidak.

Put: Cerita mengenai buat janji, kedudukan kawan-kawan kamu dan pergerakan kamu dari 9 November 2000 hingga 11 November 2003 adalah antara kamu kepada C/Insp Hamidon.

Jawapan: Tidak.

Put: Kesemua allegasi dan tohmahan terhadap C/lnsp Hamidon adalah rekaan semata-mata.

Jawapan: Tidak.

[29] In re-examination the appellant said as follows:

Pada masa saya ditahan saya telah kehabisan ubat antibiotik.

[30] The appellant called his father, Md Rashid Ishak (SDT2) as a witness in the course of the trial within a trial; SDT2 testified as follows:

> Shamsir ialah anak saya. Dia pernah ditangkap oleh polis. Saya pernah terima panggilan dari polis mengenai tangkapannya pada pagi 12 Mac 2000. Panggilan kali pertama saya tak pasti dengan siapa — saya dalam keadaan kelam kabut.
>
> Saya dapat panggilan sebanyak dua kali. Pada 13 Mac 2000 saya terima panggilan telefon. Saya dengar suara anak saya memperkenalkan dirinya. Saya dengar 'ayah, ini Sham'. Selepas itu orang lain yang cakap. Dia perkenalkan dirinya Hamidon. Dia persilakan saya pergi ke lokap K Klawang. Saya tak tahu siapa Hamidon. Saya terima panggilan lebih kurang jam 4.00 petang.

[31] Under cross-examination SDT2 said:

> Pada kali pertama terima panggilan telefon dia ada sebut Balai Polis K Klawang. Dia ada cakap siapa buat panggilan tetapi saya terlupa fikiran saya kelam kabut. Dia ada cakap fasal tangkapan dadah di bawah s 39B. Saya tahu hukuman kes ini — gantung. Saya sayang anak saya.
>
> Panggilan telefon kali pertama saya terima di sebelah pagi. Bila terima panggilan kali pertama saya tak pergi ke K Klawang. Saya tahu semasa dalam tahanan reman polis tak boleh berjumpa. Saya tak ada minta nak jumpa.
>
> Memang ada C/Insp Hamidon pelawa saya datang jumpa. Selepas dipelawa saya ada pergi ke balai K Klawang dan jumpa penjaga balai, selepas 10 hari dapat pelawaan. Saya tak pergi awal kerana saya tak ada duit.

SDT2 denied that he concocted the story about SPT1's invitation to visit the police lock-up at K Klawang.

[32] To rebut the allegation that SPT1 had called SDT2 on the day that the cautioned statement was being recorded, the prosecution was given leave to recall SPT2. In his evidence, SPT2 said he was attached to the Jelebu police district headquarters since 1989. He is familiar with the room utilised by SPT1 to record the cautioned statement as that was his office. He testified that there was no telephone in the said room at the material time.

[33] Before us, the appellant's counsel canvassed the following arguments with regards to the cautioned statement:

(a) that it is inadmissible as there is no evidence of the actual words of the caution that was administered;

(b) that the cautioned statement does not show that the appellant's handcuffs were taken off when recording began;

(c) that SPT1's evidence that the appellant looked normal and that he had conducted a physical examination of the appellant is contrary to ss 91 and 92 of the Evidence Act 1950;

(d) that the appellant did not sign the first page of the cautioned statement;

(e) that there was an unexplained delay of two days prior to the recording of the cautioned statement;

(f) that when the appellant complained to SPT1 about his leg injury that he suffered prior to his arrest and that he needed medication, SPT1 promised that he will give him a painkiller and will allow him to meet his family; and

(g) that Zubir and Aman had coerced him to give the cautioned statement but Zubir and Aman were never called by the prosecution during the trial within a trial.

[34] Premised upon the above arguments, the appellant's counsel submitted that the learned trial judge was wrong in ruling that the cautioned statement was admissible. To support his arguments, he referred to *Public Prosecutor v Ooi Teng Chuan* [2005] 4 CLJ 557. In that case, this court held that the cautioned statement made by the accused was inadmissible as there was no evidence of the actual words of the caution that was administered. The court further held that there is however no requirement in law, as contemplated by the learned trial judge there that it must be explained to the accused that if he is found guilty he would be sentenced to death and that what the accused must be made aware of is that he is not obliged to say anything or to answer any question and that anything he says may be used as evidence.

[35] We cannot see the relevance of the above authority as the facts of the instant appeal are clearly different. In the instant appeal SPT1 testified that prior to recording the cautioned statement from the appellant, he administered the caution under s 37A(1)(b) of the Act and consequently asked him whether he understood the caution. Upon getting a positive answer he asked the appellant whether he wanted to give a statement. After getting a positive answer he asked the appellant as to whether he was induced, threatened or promised to give a statement. The appellant answered that he was willing to give a statement as he was the one who did it and did not want to involve his other three friends. Both the appellant and SPT1 then affixed their respective signatures to that part of the cautioned statement wherein the caution under s 37A(1)(b) of the Act was also reproduced. The appellant then related to SPT1 as to what transpired on 9 March 2000 up to the day of the incident when he and the others were arrested at the police road block.

[36] SPT1 and the appellant are Malays and they were both speaking in the Malay language. They could understand each other. The evidence in the instant appeal showed that the actual words of the caution was administered whereas in *Ooi Teng Chuan* the court held (at p 575) that 'there is no evidence

of the actual words of the caution that was administered'. Under the circumstances of the instant appeal, we are of the view that there is clear evidence that the caution under s 37A(1)(b) of the Act was administered.

[37] Counsel for the appellant had also referred to *Wong Mee Sieng v Public Prosecutor* [1999] MLJU 300 which dealt with an appeal from the subordinate court. In that case, when recording the accused's caution statement, the recording officer had read the caution to the accused and this was interpreted to the accused by a police constable named Angela Hung. Although the cautioned statement did not show that the caution was explained to the accused, Angela Hung had testified that she did in fact explain it to the accused. One of the grounds of appeal relied on by the accused was that the cautioned statement ought not to have been admitted because the caution was not explained to him. The alleged explanation of the caution was not stated in the cautioned statement. Tee Ah Sing J, in allowing the appeal, was of the view that the oral evidence of Angela Hung that she explained the caution to the appellant was not admissible because, by virtue of ss 91 and 92 of the Evidence Act 1950, oral evidence given during the trial to contradict or vary or add to the cautioned statement would be excluded. As such, the learned judge there held that there was no evidence to show that the caution was explained to the accused.

[38] We are of the view that the facts in *Wong Mee Sieng* are clearly different from the circumstances in the instant appeal. There was a need in that case to use the services of an interpreter whereas in the instant appeal the appellant and SPT1 were speaking in their mother tongue. SPT1 administered the caution to the appellant and in answer to SPT1's question, he said he understood the caution and that he was willing to give a statement. He also informed SPT1 that he was not induced or threatened or promised but was willing to give a statement as he was the one who did it and did not want to involve his three friends. These facts would denote that the appellant was aware that he was not obliged to say anything or to answer any question and that anything he says may be used as evidence. Premised upon this, we are of the view that what was held in *Wong Mee Sieng* has no bearing upon this instant appeal and that ss 91 and 92 of the Evidence Act 1950 clearly did not apply.

[39] Counsel for the appellant also referred to *Tan Ewe Huat v Public Prosecutor* [2004] 1 MLJ 559. In that case the Federal Court held:

(i) there is no burden on an accused to prove that the statement recorded from him is involuntary;

(ii) the burden lies on the prosecution to show positively that the statement was voluntarily given;

(iii) there is also no burden on the accused to raise a reasonable doubt as to the voluntariness of a cautioned statement;

(iv) the only burden on the accused is to show suspicious circumstances surrounding the making of, or recording of, the cautioned statement;

(v) so long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial judge to hold it inadmissible.

[40] We noted that in *Tan Ewe Huat*, the conviction was based mainly on the cautioned statement. In allowing the appeal, Mohd Noor Ahmad FCJ said (at pp 530–531):

> However, in the case at hand, upon a scrutiny of the judgment of the learned judge, we are satisfied that the learned judge did not at all consider whether the voluntariness of the incriminating admissions in the cautioned statement was destroyed or not by the fact that the appellant made the said admissions in the hope that someone close to him might benefit thereby. In our view, the learned judge ought to have considered that point even if it appears that there was absence of any hope of advantage held out by someone in authority. The fact that the co-accused was also charged subsequently is immaterial. What is pertinent are the circumstances prevailing at the time of the making of the cautioned statement. The learned judge merely held that the cautioned statement was voluntarily given by the appellant because he was satisfied that the caution administered to the appellant was proper and the appellant understood the caution and there was no inducement when the cautioned statement was given. Although the learned judge did say that he did not accept the appellant's claim that the appellant fabricated the incriminating admissions in the cautioned statement in order to save the co-accused, that statement by the learned judge is only concerned with the fact that he did not believe the appellant. There is no burden on an accused that the incriminating admissions were fabricated rather than on the voluntariness of the cautioned statement. Therefore, there was non-direction on the part of the learned judge. The non-direction tantamount to a misdirection.

[41] We are of the view that the facts in *Tan Ewe Huat* can be distinguished from that of the instant appeal. In *Tan Ewe Huat* the appellant was charged under s 39B(1)(a) of the Act together with another co-accused, his female companion. The appellant was apprehended after a chase and had led the police party to a motorcar. The co-accused was found sitting in the front passenger seat and a bunch of keys was seized from her. In the course of investigations the police brought the appellant and the co-accused to a house which was rented by the appellant. They entered the said house by using one of the keys from the bunch of keys seized from the co-accused. The dangerous drugs were found in one of the rooms. The police also found the international passports of the appellant and the co-accused in the same room. The appellant gave a cautioned statement which in the course of trial was challenged as being admissible but was admitted in evidence after a trial

within a trial. The facts denote that the services of an interpreter was used in the recording of the cautioned statement. In the cautioned statement, the appellant admitted that the police had examined his room and the police found the drugs and the weighing machine in the cupboard which he had kept under lock and key. He also admitted having previously sold part of the drugs from the lot. Further, he admitted that he and the co-accused stayed together in the room. However, he stated that the co-accused had no knowledge of the drugs found in the room and that she was not at all involved with the drugs. At the close of the prosecution case, the co-accused was acquitted and the appellant was called upon to enter his defence. In his defence, the appellant deposed that he had fabricated the incriminating admissions in the cautioned statement as he wished to protect the co-accused and that the drugs were not his, that the room where the drugs were found was not his, that the room belonged to a male friend, that he was merely making use of that room, and that the house was occupied by five or six persons. At the conclusion of the trial, the appellant was convicted and sentenced to death. His appeal to this court was dismissed. His appeal to the Federal Court was allowed and his conviction was quashed.

[42] In the instant appeal, as discussed earlier, there was no requirement for the services of an interpreter. The facts showed a nexus between the appellant and the contents of the said bag containing the said dangerous drugs, viz, the outpatient card issued by the Kajang Hospital in the name of the appellant, the sick leave certificate in the name of the appellant issued by the same hospital and the bunch of keys. SP10 testified that the appellant was staying in her house and that she had given him a spare key to the house. The evidence also showed that one of the keys in the bunch of keys recovered from the said bag could be used to gain entry to the said house. Further, there was no claim on the part of the appellant that he had fabricated the incriminating admission. The facts in the instant appeal can clearly be distinguished from that found in *Tan Ewe Huat*.

[43] In *Chan Ming Cheng v Public Prosecutor* [2002] 3 MLJ 733, which was also referred to by the appellant's counsel in his submission, Gopal Sri Ram JCA said (at p 82):

> There is no burden on an accused to prove that the statement recorded from him is involuntary. The burden lies on the prosecution to show positively that the statement was voluntarily given. There is also no burden on an accused to raise a reasonable doubt as to the voluntariness of a cautioned statement. The only burden on an accused is to show suspicious circumstances surrounding the making of or recording of the cautioned statement. So long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial judge to hold it inadmissible.

[44] To conclude his arguments in relation to the cautioned statement, the appellant's counsel referred to *Hasibullah bin Mohd Ghazali v Public Prosecutor* [1993] 3 MLJ 321 where Edgar Joseph Jr SCJ said (at p 541):

> It is true that the judge painstakingly recounted the testimony given before him during the trial within a trial to determine the admissibility of the appellant's replies and then found, as a fact, that following the prescribed caution, the replies attributed to the appellant were made by him, voluntarily and that they were true. But, nowhere in his judgment did he even mention the significance of that evidence; namely, the matters to which we have just referred regarding this part of the case, which had troubled us not a little and made us suspicious of the prosecution's version as to the alleged replies by the appellant which, to put it mildly, seemed to us, too good to be true. We considered that the judge's failure to do so was a misdirection by way of non-direction. We were therefore of the view that the judge was wrong in holding that the prosecution had proved beyond reasonable doubt that the appellant did make the alleged confession attributed to him.

Premised upon this case cited above, the appellant's counsel argued that the learned trial judge failed to give reasons as to why he ruled that the cautioned statement is admissible.

[45] At the end of the trial within the trial, as discussed earlier, the learned trial judge ruled that the cautioned statement was made voluntarily and as such is admissible. In his grounds of judgment, with regards to the admissibility of the cautioned statement, he said:

> Di akhir 'voir dire' ini mahkamah telah memutuskan bahawa pernyataan beramaran tertuduh itu telah dibuat dengan sukarela tanpa sebarang dorongan, ugutan atau paksaan dari mana-mana pihak. Justeru itu ianya telah diterima masuk sebagai keterangan pihak pendakwaan iaitu P20.

Thus, the learned trial judge's reason for admitting the cautioned statement as forming part of the prosecution's case was that it was made voluntarily without any inducement, threat or promise. The appellant's counsel argued that that was not enough and that the learned trial judge must give more reasons than that.

[46] In considering this argument, we made reference to the views of Visu Sinnadurai J in *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576, at p 584 where he said:

> Section 37A like s 113 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') serves two purposes: (i) to assist the prosecution in establishing its case against the accused; and (ii) to protect the accused against the admission of incriminating statements made by him, falsely induced by hope or fear. The whole process has to be considered by the court in its totality, bearing in mind that so long as the

arrested person was aware and fully understood the implications and the consequences of making the statement, it should be admissible.

Whether the arrested person did or did not understand the implications and consequences of making the statements, depends on the facts of each case. It is therefore a question of fact which each court has to decide. In this regard, precedents whilst being useful in providing guidance, cannot be strictly adhered to. The ultimate test is whether the statement sought to be admitted 'appears to the court' to be voluntarily made. Generally, voluntariness is an accepted term used to indicate that the statement made by the accused was at the free will of the arrested person.

(Emphasis added.)

[47] We would agree with the views of Visu Sinnadurai J. In that case, the learned judge ruled that the cautioned statement was not admissible premised upon the following circumstances which he dealt with in his judgment as follows (at pp 584–585):

Let us consider the facts of the present case: the police conducted an early morning raid. The first accused was handcuffed almost immediately and he was questioned soon after that. At this time, the accused person was confronted by several police personnel all over the house. The statement, therefore does not appear to have been recorded in a calm environment. The accused person was questioned throughout the house whilst search appeared to have been conducted simultaneously. The accused was asked to open certain exhibits whilst statements were being recorded by the raiding officer. At times, another person (Ismail Katan) was also being questioned simultaneously. At other times, the recording of the statement was taken over by another police personnel. Simultaneously, photographs were taken of the accused person. It would therefore appear that it would have been more appropriate for the police to have asked the accused to show the various exhibits, photographed the sequence of events and then asked the accused to make the statement after administering the necessary caution. It must be pointed out, that the mere mechanical administration of a caution by itself is, in most cases, insufficient to show that there has been due compliance with the law.

There were some suggestions of a promise being made to the accused person — the accused person alleging that the police personnel had promised not to harm his wife, children and a relative who were all in the house. By itself, the defence was unable to convince the court that the statement made by the accused was in furtherance of this promise. In any case, if there was such a promise, it would be a further factor to indicate the involuntariness of the statement made by the accused.

The learned deputy public prosecutor has diligently provided the court with much assistance by furnishing relevant authorities to support her contention that the statement made by the accused was voluntary. Whilst these authorities proved helpful to the court, the learned deputy public prosecutor had a difficult task in persuading the court that the hurried and chaotic manner in which the statement was recorded by the police was the most desirable manner of recording the statement in the circumstances of the case. No reasonable explanation was given as to the haphazard manner in which the statements were recorded by the police.

There are also certain procedural aspects of the recording of the statement which has caused some concern to the court. Insp Giam who recorded much of the statement was also an officer who took an active part in the raid. Furthermore, whilst taking the statement from the accused person, Insp Giam also actively participated in photographing the various exhibits which were found in the house. Whilst it may be true that the mere fact that the recording officer was also an officer taking an active role in the raid does not by itself vitiate the cautioned statement (see *Mohamed Yusof bin Haji Ahmad v Public Prosecutor* [1983] 2 MLJ 167), considering the several roles played by Insp Giam, it would appear that there was a possibility of some 'likelihood of bias' on his part: see *Cheong See Leong v Public Prosecutor* [1948-1949] MLJ Supp 56; *Public Prosecutor v Yong Kong Hin* [1981] CLJ 178; and *Lee Look v Public Prosecutor* [1985] 1 MLJ 240.

One other disturbing feature of the procedural aspect of the recording of the statement was that the statements of not only the first accused, but also another, Ismail Katan, were recorded in the same statement. As a consequence, there was at times some confusion as to which of the statements were that of the first accused and which were of Ismail Katan.

To further add to this confusion, Insp Giam also said in evidence that whilst he was photographing the accused, he instructed another police officer to take over the recording of the statement. It would appear, that in their enthusiasm, the police were not adequately prepared to record a proper cautioned statement of the accused person. It certainly would have been more desirable for a specified officer, other than Insp Giam, to have been assigned the responsibility of administering a proper caution to the accused person and then to record the statement of the accused person.

The end result of all this confusion is that it appears to the court that no proper caution was in fact administered and that the statement made by the accused was, therefore, not in compliance with the requirements of the law.

Therefore, considering all the facts of the present case in its totality, this court is of the view that the statement made by the accused is inadmissible.

[48] Before considering whether the learned trial judge in the instant appeal was correct in ruling that the cautioned statement is admissible, we had in the forefront of our minds the case of *Tan Boon Teck v Public Prosecutor* [1950] MLJ 44 where Laville J said as follows:

An appeal is merely a continuation of the trial, and throws open all the evidence to re-examination in order to determine whether or not the various findings of the trial court are correct.

[49] We are of the unanimous view that the learned trial judge in the instant appeal was correct in ruling that the cautioned statement is admissible for the following reasons:

(a) that the appellant and SPT1 had never met until the day the cautioned statement was recorded; the appellant was brought by SPT2 to the room to be utilised by SPT1 to record the cautioned statement;

(b) that prior to recording of the cautioned statement, SPT1 directed SPT2 to take off the appellant's handcuffs and wait outside the room and to close the door;

(c) the appellant and SPT1 were speaking in Malay and could understand each other; no one else was present at that material time;

(d) prior to taking down the cautioned statement, SPT1 asked him about his health and noted that there were no visible injuries on his person;

(e) there was clear evidence that the actual words of the caution as provided for under s 37A(1)(b) of the Act was administered to the appellant; upon being asked, the appellant replied that he understood the cautioned administered and that he was willing to give the statement;

(f) upon being asked as to whether he was induced, threatened or promised to make the statement, the appellant answered that he was willing to give the statement as he did not want to involve his three friends;

(g) consequently, when asked as to what he wanted to say in his statement, the appellant related in detail as to what transpired between 9 March 2000 until the day of the incident, ie, 11 March 2000; and

(h) upon being asked at the end of the recording of the statement, the appellant answered that what he said is true and that he did not wish to add or amend his statement and again confirmed that he was not induced, threatened or promised to make the statement and consequently affixed his signature to the statement.

[50] In his evidence during the trial within a trial, the appellant challenged the admissibility on the following grounds:

(a) that he did not meet SPT1 on his own free will;

(b) that he was still handcuffed when he gave the statement;

(c) that he was not in a proper frame of mind when he met SPT1;

(d) that he was not allowed to speak to anyone and was not allowed to contact anyone when he was with SPT1;

(e) that SPT1 contacted his father (SDT2) by telephone when he was in the room and he was allowed to speak to SDT2 on the telephone;

(f) that no caution was administered to him by SPT1 and that he was not informed of his right not to give a statement or to answer any question;

(g) SPT1 promised to give him a painkiller and that he will be able to meet his family;

(h) he denied that he informed SPT1 that he was willing to give the statement so as not to involve his three friends; and

(i) that Zubir and Aman induced him to make the statement.

[51] Based upon what has been elucidated above, we would agree with the ruling of the learned trial judge that the cautioned statement is admissible. The prosecution had positively shown that the statement was voluntarily given. There was nothing suspicious about the making or recording of the caution statement. The statement was recorded in a calm environment in a room unlike that in *Public Prosecutor v Muhammad Nasir bin Shaharuddin & Anor*, where the recording of the statement was in the course of the police raid and in the presence of several other police officers. Further, the recording was carried out by more than one officer who was also involved in the raid. It also appeared to the court that no proper caution was administered and hence was not in compliance with the law.

[52] In the instant appeal, we cannot find anything to show that the statement was not voluntarily given. The facts speak for themselves. The claim by the appellant that SPT1 promised to give him a painkiller seems to be a non-issue as there is no evidence that the appellant had in his possession such medicine, if at all it was for his leg injury, when he was arrested. We also noted that he was embarking on quite a long journey, viz, to Jengka, Pahang when he was arrested. His claim that SPT1 called SDT2 on the telephone in the room and that he was allowed to speak to STD2 would also seem to be a non-starter as the prosecution has proved that there was no telephone in the room used for recording the cautioned statement. There being no inducement, threat or promise from a person in authority and there being no suspicious circumstances surrounding the making or recording of the cautioned statement, we cannot see where the learned trial judge had gone wrong when he ruled the same to be made voluntarily and as such is admissible. We would think that the appellant's claim that Zubir and Aman induced him to make the statement was an afterthought.

[53] On the evidence adduced by the prosecution, we find that the appellant was clearly in possession of the said dangerous drugs kept in the said bag and found underneath the driver's seat of the said motorcar. The said bag clearly belonged to the appellant. Besides the said dangerous drugs, it contained the outpatient card issued to him by the Kajang Hospital, his sick leave certificate and the bunch of keys amongst which was the key to SP10's house where he was residing at the material time and these items are the nexus that established that the appellant had the power of controlling the

contents of the said bag wherein the said dangerous drugs were found. These facts denote that the said dangerous drugs found therein were in his custody and control. He clearly had knowledge of the dangerous drugs as he was the one who purchased it, packed it and placed it in the said bag on the night prior to the date of the incident. The caution statement which formed part of the prosecution's case confirms this. As such, we are of the view that the learned trial judge was correct in finding that the prosecution has proved that the appellant was in possession of the said dangerous drugs and that it was in his custody.

[54] What is also clear is that the said dangerous drugs, ie, 366.1g of cannabis is in excess of 200g as provided under s 37(da)(vi) of the Act. This would trigger the statutory presumption of trafficking as provided in s 37(da) of the Act.

[55] Premised upon the facts of the instant appeal, we find that the learned trial judge was correct in finding that a prima facie case has been made out against the appellant at the conclusion of the case for the prosecution on the offence charged and calling upon him to enter on his defence. In his defence, the appellant stated that the said bag belonged to Aman and that he had handed his outpatient card, his sick leave medical certificate and his bunch of keys for safekeeping when they embarked on the trip to Jengka, Pahang. He then claimed that he is a drug addict, that he started smoking cannabis in 1995, that he smoked cannabis three times a week and that he obtained his supply from Aman. The learned trial judge found that the appellant failed to cast a reasonable doubt and after considering all the evidence adduced decided that the prosecution has proved its case beyond reasonable doubt and hence found him guilty and convicted him on the charge of trafficking of the said dangerous drugs.

[56] We cannot find where the learned trial judge went wrong in finding the appellant guilty of the offence as per charge. What is blatant to us is that there was a lack of cross-examination of witnesses during the prosecution's case by the defence touching upon its claim that the said bag belonged to Aman or that the appellant was addicted to cannabis and that he obtained his supply from Aman. The minutes of the proceedings showed that Aman and also Zubir were not called by the prosecution but were offered as witnesses for the defence by the prosecution at the close of the prosecution's case. The appellant's counsel informed the court that he did not require them. Be that as it may, the defence that the said bag belonged to Aman was only suggested for the first time when defence was called (see *Re Pichi Muthu* [1970] 2 MLJ 143).

SECTION 114(g) EVIDENCE ACT 1950

[57] Before us, with regards to the non-calling of Aman and Zubir by the prosecution, the appellant's counsel argued that s 114(g) of the Evidence Act 1950 should apply. We cannot see any merits in such an argument. The law in relation to the calling of witnesses by the prosecution is clear, viz, that the prosecution has a discretion as to what witnesses should be called for the prosecution and the court will not interfere with the exercise of that discretion. In *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105, Thomson CJ said (at p 109):

> It is, of course, well settled that in a criminal case prosecuting counsel, provided there is no wrong motive, has a discretion as to whether or not to call any particular witness and in particular has a discretion not to call in support of his case a witness whom he does not believe to be a witness of truth.

In the case of *Reg v Woodhead* 2 C & K 520, Alderson B referred to:

> The rule which the judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment.

He went on to say:

> The witnesses, however, should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in court, but they are to be called by the party who wants their evidence.

Again, in the case of *Reg v Cassidy* 1 F & F 79, Parke B said that he considered the correct principle was:

> That the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury whose names were on the back of the indictment, he only impliedly undertook to have them in court for the prisoner to examine them, as his witnesses.

In the case of *Adel Muhammed El Dabbah v Attorney-General for Palestine* [1944] AC 156, at p 168 Lord Thankerton referred to the cases of *Woodhead* and *Cassidy* and observed:

> The prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive.

The following year the point was again considered in the case of *Malak Khan v The King-Emperor* 72 IA 305, at p 314 and Lord Thankerton repeated in effect what he had said the previous year and said:

> There is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove. Ultimately it is a matter for the discretion of counsel for the prosecution.

The question had been considered by the Privy Council some years earlier in the case of *Seneviratne v R* [1936] 3 All ER 36. In that case Lord Roche (at p 48) referred to a supposed obligation on the prosecution to call every available witness and then observed:

> Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination.

[58] In *Mohamed Kassim v Reg* [1956] MLJ 212, Spenser Wilkinson J was also of the view that the prosecution has a discretion in the calling of witnesses; he said (at p 213):

> It is not clear to me why the prosecution called the accused's wife as a prosecution witness at all. It was held as long ago as 1937 (see *Public Prosecutor v Lee Pak* [1937] MLJ 265; [1938] FMSLR 1), that in a summary trial the prosecution need not call every witness from whom a statement has been taken and this case was followed in *Teh Lee Tong v Rex* [1956] MLJ 194. The following passage from the judgment in the latter case sets out the position in regard to summary trials:
>
> > I think the result of the above remarks combined with the two decisions referred to may be summarised in this way:
> >
> > (1) All the witnesses from whom statements have been taken should be brought to the court by the prosecution, except those whose evidence will clearly and obviously throw no light on the case; any witness not so brought to court must be made available to the accused, should he desire to call him.
> >
> > (2) Having brought the witnesses to court the prosecuting officer is not bound to call or to offer for cross-examination a witness whose evidence is in his opinion unnecessary or is obviously hostile.
> >
> > (3) The existence of witnesses brought to court but not called or offered for cross-examination under (2) above must be brought to the attention of the court so that they are available to be called by the defence, or by the court should the court consider this necessary.

I would only add to what was said in that case that the discretion thus exercised by the prosecution must be exercised fairly and will not excuse the prosecution from calling a witness who clearly ought to have been called and that the situation will in practice often be met by offering a probably hostile witness for cross-examination (see *Adel Muhammed El Dabbah v Attorney-General for Palestine* [1944] AC 156; [1944] 2 All ER 139).

[59] In *Teh Lee Tong v Rex* [1956] MLJ 194 Spenser Wilkinson J repeated what was said earlier; he said (at p 195):

Whilst it is no doubt true that it is the duty of the prosecution to lay all the material evidence before the court I do not think that this principle need be carried to the length of calling for the prosecution witnesses whose evidence is wholly adverse to the prosecution and wholly favourable to the defence — in short, defence witnesses — simply because statements have been taken in the course of the investigation. The following passage from the judgment of Whitley Ag CJ in the case of *Public Prosecutor v Lee Pak* [1937] MLJ 265; [1938] FMSLR 1 is relevant in this connection:

> It is not incumbent upon the prosecution to call as witnesses all persons from whom statements have been taken. If it is clear that their evidence will throw no light on the case, it would be a sheer waste of time and money to bring them to court. If the accused should desire to call any such person as a witness he should of course be given the opportunity to do so, no matter what view the prosecution may have taken as to the value of the evidence which he is able to give. This question of to what extent the prosecution is bound to call witnesses was discussed in the case of *Rex v Sanmugam* [1932] MLJ 75; [1933] SSLR 337, where a number of authorities are referred to, but that case only deals with witnesses who have been called at a preliminary enquiry. In a summary trial before a magistrate the prosecuting officer must of course have a far wider discretion.

The relevant passage from the judgment in *Rex v Sanmugam* [1932] MLJ 75; [1933] SSLR 337 is as follows:

> In a trial by jury the prosecuting officer is not bound to call as a witness for the Crown or tender for cross-examination a witness who gave evidence in the preliminary enquiry, whose evidence in his opinion is unnecessary, hostile, or not believed.

[60] In *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, Mohamed Azmi SCJ in delivering the judgment of the court said (at p 494):

It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but

material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[61] Under the circumstances in the instant appeal, we are of the view that s 114(g) of the Evidence Act 1950 would not apply.

[62] For the reasons aforesaid, we dismiss this appeal. The conviction and sentence imposed by the High Court are affirmed.

Appeal dismissed.

Reported by K Nesan